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Supreme Court of the United States.

No. 119.

THE WESTERN UNION TELEGRAPH COMPANY,
Plaintiff in Error,

vs.

CHARLES E. HUGHES,
Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

JOHN F. DILLON,
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IN ERROR TO THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA.

Stillman Appellate Printing Co., 6 Park Place, N. Y.

Supreme Court of the United States.

THE WESTERN UNION TELEGRAPH COMPANY,
Plaintiff-in-Error,

against

CHARGES E. HUGHES,
Defendant-in-Error.

No. 411.

STATEMENT.

This case comes into this Court by writ of error from the Supreme Court of Appeals of the State of Virginia. The plaintiff in error challenges the judgment of that tribunal on the ground that the judgment is based on two statutes of the State of Virginia, which are claimed, in so far as they, or either of them, have been held to apply to the subject matter of this suit, to be in violation of the commerce clause of the Federal Constitution. The acts in question are as follows (the section numbers given being from the Code of Virginia of 1887):

> "Section 1291. **Receipt and transmission of dispatches.** It shall be the duty of every telegraph or telephone company doing business in this State, to receive dispatches from and for other telegraph or telephone companies or lines, and from and for any person; and upon the payment of the usual

charges therefor, according to the regulations of the company, to transmit the same faithfully and impartially and as promptly as practicable, and in the order of delivery to the said company. For every failure to transmit a dispatch, faithfully and impartially, and for every failure to transmit a dispatch as promptly as practicable, or in the order of its delivery to the company, the company shall forfeit the sum of one hundred dollars to the person sending or wishing to send such dispatch. But nothing herein shall prevent any such company from giving preference to dispatches on official business from or to officers of the United States or the State of Virginia, or from making arrangements with proprietors or publishers of newspapers, for the transmission to them, for publication, of intelligence of general and public interest, out of its regular order.

"Section 1292. **Their Delivery.** It shall be the duty of every telegraph or telephone company, upon the arrival of a dispatch at the point to which it is to be transmitted by said company, to deliver it promptly to the person to whom it is addressed, where the regulations of the company require such delivery, or to forward it promptly as directed, when the same is to be forwarded. For every failure to deliver or forward a dispatch as promptly as practicable, the company shall forfeit one hundred dollars to the person sending the dispatch, or to the person to whom it was addressed."

The record in the case at bar shows the following facts:

On November 2, 1903, at 8.00 a. m. Hughes, the defendant in error (plaintiff below), delivered to the Western Union Telegraph Company, the plaintiff in error (defendant below), at its office in the City of Danville, in the State of Virginia, a certain message

addressed to Miss Isabelle Malone, Pocahontas, Va., care of Pocahontas Inn, reading as follows: "Mother taken sick Saturday night, am afraid fatal attack, wrote you yesterday, come if can," signed "C. E. Hughes," to be transmitted over the defendant's lines from its office at Danville to the town of Pocahontas, and there to be delivered to Miss Isabelle Malone, the addressee, who was then living at the Pocahontas Inn at Pocahontas. The defendant's charges for transmitting and delivering this message were not paid by the plaintiff at the time he delivered the message to the defendant, but were charged to his account, and subsequently, and before this suit was brought, paid by him. The only possible and only proper route for the transmission of a telegraphic message from Danville, Va., to Pocahontas, Va., was, on the day in question, by way of Bluefield, W. Va. (Record, p. 13). The message which is the subject of this suit was sent by the defendant from its office at Danville, Va., to its office at Richmond, Va., at 8.20 a. m., on November 2, 1903, and from its office at Richmond, Va., to its office at Bluefield, W. Va., at 9.05 a. m., on the same day. It was duly received at Bluefield (Record, p. 13). The message, however, was never received by the Western Union over its wires or in its office at Pocahontas, Virginia, and was never delivered to the addressee, Miss Isabelle Malone, at the Pocahontas Inn there, or to her or to any one for her at any other place (Record, p. 13).

On November 10, 1903, the plaintiff commenced this suit in the Corporation Court of Danville, Va. On the first Monday in December, 1903, he filed in that court his declaration, alleging:

> "that it was the duty of the said defendant company to transmit the said message faithfully, impartially and as promptly as practic-

> able to the said Miss Isabelle Malone, at Pocahontas Inn, Pocahontas, Virginia. Yet the said plaintiff avers that the said defendant company wholly failed to discharge its duty in this regard to the plaintiff, and did not faithfully and impartially and as promptly as practicable transmit the said message to the said Miss Isabelle Malone, at Pocahontas Inn, Pocahontas, Va., and in consequence of the said breach of duty on its part and of its failure to transmit faithfully, impartially, and promptly as practicable the said message of the said defendant company, under the statutes in such case made and provided, became indebted to the said plaintiff in the sum of One hundred dollars ($100)" (Record, p. 9).

On the third Monday in December, 1903, the defendant filed its written demurrer, and also written plea of the general issue.

Thereafter on January 9, 1904, the defendant's demurrer was overruled, issue was joined, a jury was waived, and the Court, after hearing the evidence adduced, rendered a judgment in favor of the plaintiff for the amount claimed in the declaration, $100 statutory penalty, together with interest thereon from that date (Record, p. 11). Thereafter, and during the same term of the Court, the defendant moved to set aside the judgment and grant a new trial

> "because the facts in the case show that the transmission of the message set out and copied in the declaration in this case is interstate commerce and not subject to the control or regulation of Sections 1291 and 1292 of the Code of Virginia of 1887, or of either of them" (Record, p. 12).

And at the same time, and for the same reason the defendant moved the Court to arrest the judgment. (*Ibid.*)

The Federal question was distinctly raised by both of these motions made by the defendant.

Both motions were overruled, a bill of exceptions was taken and the case carried to the Supreme Court of Appeals of Virginia (Record, pp. 12, 13 and 14). The Supreme Court of Virginia, by a divided vote of three to two, decided, for reasons incorporated in the record (Record, pp. 19 and 20), that the writ of error on which the case was taken thither from the Corporation Court of Danville was improvidently awarded because no Federal question was involved in the case; and therefore that the Supreme Court had no jurisdiction to entertain it, and ordered that the writ be dismissed (Record, p. 21).

Under the Constitution of Virginia which went into effect July 10, 1902, and was the law of the State under which this case was tried, *the Supreme Court of Appeals, in reaching the conclusion that it had no Appellate Jurisdiction over the case, necessarily decided that, in its opinion, no Federal question was involved in the case;* since the State Constitution provided that the Supreme Court of Appeals should have appellate jurisdiction "in all cases involving the constitutionality of a law as being repugnant to the Constitution of this State or of the United States" (Article VI, Section 88, 2nd paragraph).

From this final judgment of the Supreme Court of Appeals of Virginia, dated June 22, 1905, which, as has been shown, necessarily involved a determination by that Court that no Federal question was involved, the writ of error is prosecuted to this Court.

ERRORS ASSIGNED.

The assignment of errors in this Court is as follows (Record, pp. 22, 23):

"The Supreme Court of Appeals of Virginia erred (1) in failing to reverse the judgment rendered by the Corporation Court of Danville (Virginia) in favor of C. E. Hughes against the Western Union Telegraph Company for One hundred dollars with interest and costs; (2) erred in holding that the writ of error awarded by it (the said Supreme Court of Appeals of Virginia) in the above styled case was improvidently awarded; and (3) erred in holding that it had no jurisdiction to entertain said writ of error. The said Supreme Court of Appeals of Virginia should have reversed the said judgment rendered by the Corporation Court of Danville (and should have entered judgment in favor of the plaintiff in error). The said judgment was controverted and drawn in question by the plaintiff in error on the ground that said judgment was and is repugnant to the Constitution of the United States (Article 1, Section 8) providing that Congress shall have power 'to regulate commerce with foreign nations and among the several States and with Indian tribes, and in contravention thereof in the following particulars:

"First. That the Supreme Court of Appeals of Virginia erred in failing to hold that the transmission of the telegraphic dispatch described in this case was interstate commerce and not subject to the control or regulation of Sections 1291-1292 of the Code of Virginia, edition of 1887, or either of them.

"Second. The Supreme Court of Appeals of Virginia erred (1) in failing to hold that the transmission of said telegraphic dispatch from Danville, Virginia, to Pocahontas, Virginia, by way of Bluefield in the State of West Virginia, where said dispatch was lost—, was interstate

commerce; and (2) in failing to hold that said Sections 1291-1292, and each of them, of the Code of Virginia, edition of 1887, as applied (*a*) to said telegraphic dispatch, (*b*) to its transmission within the State of West Virginia, and (*c*) to its loss within the territorial limits of the State of West Virginia, were and are repugnant to Article 1, Section 8, of the Constitution of the United States.

"For these reasons the Supreme Court of Appeals of Virginia should have reversed said judgment of the Corporation Court of Danville and should have rendered judgment in favor of the plaintiff in error.

"Third. The said final judgment of the Supreme Court of Appeals of Virginia is erroneous in not holding said judgment, rendered by said Corporation Court of Danville against the plaintiff in error, to be a regulation of interstate commerce by the State of Virginia in violation of and repugnant to Article 1, Section 8, of the Constitution of the United States, which gives to Congress the power 'to regulate commerce with foreign nations and among the several States and with the Indian tribes.'"

ARGUMENT.

I.

THE MESSAGE SUED ON IN THIS CASE WAS AN INTERSTATE MESSAGE, AND, AS SUCH, INTERSTATE COMMERCE.

It is settled by numerous decisions of this Court that a telegraph message is commerce, and that, consequently, a message originating in one State and destined to a point in another State is interstate commerce.

W. U. vs. Pendleton, 122 U. S., 347.
W. U. vs. Texas, 105 U. S., 460.
Leloup vs. Mobile, 127 U. S., 640.
W. U. vs. James, 162 U. S., 650.

The question is whether a message is interstate commerce when it originates in one State and is destined to another point in the same State, but must necessarily be transmitted to and be retransmitted or in telegraphers' parlance "relayed" in another State before it can reach its destination.

The message in the case at bar was to be sent from Danville, Virginia, to Pocahontas, Virginia. But in order to send it to Pocahontas, from Danville, it was necessarily sent first to Bluefield, West Virginia, and received at that point. This was the *only possible way* to send it to Pocahontas, Virginia (Record, p. 13), and, therefore, the *proper way* (Ibid.).

Is such a message interstate commerce?

Why it was Necessary that Messages for Pocahontas Should be Repeated or Relayed at Bluefield.

The record is not burdened by the recital of certain facts within the knowledge of everyone at all familiar with the business of telegraphy, and which indeed may be said to be matters of general knowledge—at any rate facts as to which it is conceived that there can be no dispute in this case.

The record recites that this message was sent to Bluefield, W. Va., and that this was the *only possible way*, and the *proper way* (Record, p. 13), to transmit it to Pocahontas. There is no suggestion in the case that the purpose of relaying the message at Bluefield, W. Va., was to evade the operation of the laws of Vir-

ginia, or any of them. Why it was necessary and proper that the wire used in the transmission of this message should pass over the soil of the State of West Virginia is apparent from a glance at the map. Pocahontas, the destination of the message, is situated between two ranges of mountains; on the south, the East River Mountain; on the north, the Big Stone Ridge. Only one railway line, the Norfolk & Western, runs between these ridges or mountain ranges, and affords Pocahontas the means of communication with other points, whether in Virginia or elsewhere. To the west of Pocahontas this railroad, with its connections, passes out of the State of Virginia by way of Gibson's Station and the Cumberland Gap, affording no means of reaching Danville or other points in eastern or southern Virginia without first traversing the territory of some other State. Eastwardly from Pocahontas, in order to avoid the ridges of mountains, the railroad line *necessarily* passes through about sixteen miles of that part of the State of West Virginia which is bounded on the south by the East River Mountain, and in which is situated Bluefield.

The telegraph line, as usual, follows the railroad —a necessary part of the railroad's system, and its inseparable adjunct; following, with the railroad, the line of least resistance, and crossing a State boundary line rather than a range of mountains.

The necessity, therefore, for the relaying of this message at Bluefield was a physical and actual necessity; not an invention by the plaintiff in error for the purpose of escaping the laws of Virginia.

It is a matter of general knowledge, moreover, that a company engaged in the conduct of a general telegraph business usually maintains thousands of offices, between any two of which it holds itself out to the public as prepared to offer the

means of communication by telegraph. The necessity of "relaying" messages proceeds from the fact that it is physically impossible for all of these many thousand offices to have a wire connecting directly with all the others. To do so would require the maintenence in each office of an impossible number of wires, and an impossible number of sets of instruments and operators, out of all proportion to the requirements of ordinary traffic, and to the great detriment of the telegraph service generally; without mentioning the burdening of the public highways, the post-roads of the United States, by these additional wires, to the equally great detriment of the public travel thereon. Hence the invention of the relaying process. The essential feature of this is the establishment of a system of large offices from each of which wires radiate to the small offices in a given territory, and which are connected with one another by trunk lines. The small offices send their messages to the nearest large relay point, over a wire which ends at the relay office; at the relay office the messages are written down by the operator who receives them, and are then transferred to the operator who sends then, over another and different wire, to the place of destination, or the next relay point, and this is the only way in which telegraphing for any considerable distance has ever been conducted, or can be conducted, and it is the explanation why the message in the case at bar was not sent direct, by one single act of transmission, from Danville to Pocahontas, but was necessarily and properly sent first to Richmond, and then to Bluefield in the endeavor to transmit it to its destination.

If Danville could have sent the message direct to Pocahontas, it would have done so; but for Dan-

ville to send it direct would have been as impossible as for San Francisco or for New York.

If Richmond could have sent it direct to Pocahontas it would have done so; but for Richmond to send it direct was as impossible as for Danville.

On Principle, the Message Sued On was Interstate Commerce.

If the question were absolutely *res nova*, it would seem that the answer to it should not be difficult.

The object of the Constitutional provision conferring on Congress power to regulate interstate commerce was to protect such commerce. It was to prevent a single State from prohibiting such commerce or burdening it with restrictions which would render it impossible practically and thereby work injury to the people of other States. It was to prevent different States, each, perhaps, acting in good faith and with the best intentions, from imposing on the same act of interstate transportation or transmission different and perhaps conflicting rules and regulations with all of which it might be impossible to comply. It was to prevent one State from insisting, with force if necessary, on the application of its own domestic policy to commerce passing through other States.

We venture, therefore, to assert, as a broad principle, that:

Whenever transportation or transmission is of such a character that unless it is to be regarded as interstate commerce it would be within the power of one State, acting with due process of law, to impede or prevent the thing transported or transmitted from reaching the territory of another State, for which it is destined, then that transportation or that transmission is within the protection of the

Constitutional provision, and not subject to regulation by either State.

If this is a correct statement of the law, the message in the case at bar is an interstate message.

It originated at Danville, Va., and was destined to Pocahontas, Va. But in order to send a message from Danville to Pocahontas, it was necessary, as was found as a fact by the trial court, and the reasons for which have been fully set out heretofore, first that it should be sent over one wire to Bluefield, West Virginia, and received there, and secondly, that some one at Bluefield, West Virginia, should send it (over another wire, or the "relaying" process would not be necessary or proper) to Pocahontas, Va.

The telegraph line used in this process was an interstate line. A part of it, a part necessarily used in the transmission of this message, was within the territorial jurisdiction of the State of West Virginia and subject to the State of West Virginia's physical control. The Bluefield relay office was in West Virginia, and under its control and jurisdiction. Consequently the State of West Virginia, unless prevented from so doing by the fact that the message was interstate commerce, could have (1) forbidden and forcibly prevented the transmission of the message over its territory, if, for any reason, such transmission had been deemed contrary to the domestic policy of that State; or (2) prescribed the order in which, with reference to other messages, it should be transmitted from Bluefield after its receipt there; prescribing, perhaps, a different order of transmission from that prescribed by the statute of Virginia under which the suit is brought; preferring, perhaps, some other message which under the Virginia statute the telegraph company was not authorized to prefer; or

(3) regulated the rate which should be charged for that portion (at least) of the transmission service which took place within the State of West Virginia.

The plaintiff in error respectfully insists that the State of West Virginia could have done none of these things; and if it could not, the limitation on its power can arise only from the fact that the message was interstate commerce.

Confusion Arising from Lehigh Valley Railroad vs. Pennsylvania.

Had it not been for the decision in Lehigh Valley vs. Pennsylvania, 145 U. S., 192 (1891), it is believed that it would not have been seriously conceived by any State Court that, under the Constitution of the United States, commerce passing out of the physical and territorial jurisdiction and control of the State of its origin and into that of a foreign State, should properly be regarded as other than interstate commerce, because of the further circumstance that such commerce eventually returned to a point of destination within the State of its origin. The idea that such commerce is domestic, and not interstate, is, it is respectfully submitted, a fiction. And it is a fiction wholly attributable to the Lehigh Valley case (*supra*).

In that case the question arose as to the validity of a tax imposed by the State of Pennsylvania on the Lehigh Valley Railroad Company, a corporation of Pennsylvania, on account of transportation done by it from Mauch Chunk, in that State, to Philadelphia, in the same State, by way, however, of Phillipsburg, in the State of New Jersey.

The Chief Justice, in delivering the opinion of the Court, said:

"*The tax under consideration here was determined in respect of receipts for the proportion of the transportation within the State*, but the contention is that this could not be done because the transportation was an entire thing, and in its course passed through another State than that of the origin and destination of the particular freight and passengers. THERE WAS NO BREAKING OF BULK OR TRANSFER OF PASSENGERS IN NEW JERSEY. The point of departure and the point of arrival were alike in Pennsylvania. The intercourse was between those points and not between any other points. Is such intercourse, consisting of continuous transportation between two points in the same State, made interstate because in its accomplishment some portion of another State may be traversed? Is the transmission of freight or messages between two places in the same State made interstate business *by the deviation of the railroad or telegraph line on to the soil of another State?*"

* * * * * *

"It should be remembered that *the question does not arise* as to the power of any other State than the State of the termini, nor as to taxation upon the property of the company situated elsewhere than in Pennsylvania, *nor as to the regulation by Pennsylvania of the operations of this or any other company elsewhere*, but it is simply whether, in the carriage of freight and passengers between two points in one State the mere passage over the soil of another State renders that business foreign, which is domestic. We do not think such a view can be reasonably entertained, and are of opinion that this taxation is not open to constitutional objection by reason of the particular way in which Philadelphia was reached from Mauch Chunk."

Even Under Lehigh Valley vs. Pennsylvania, the Message in this Case Should Be Treated as Interstate.

The language used by the Chief Justice in the Lehigh Valley case, has, as we shall hereafter show, been seriously misunderstood and misapplied.

But even under that decision, and giving full weight to the dicta contained in the opinion and not strictly necessary to the determination of the controversy before the Court, it is clear that the statute of Virginia now in question would not have been sustained, in its application to this message, on the principle then recognized by the Court.

Whether the Chief Justice was or was not wholly correct in his suggestion that the transmission of freight or messages between two places in the same State was not "made interstate business by the deviation of the railroad or telegraph line on to the soil of another State" (*i. e.*, by such deviation *alone*) he clearly recognized that a different situation would have existed and that a different conclusion would have been called for had there been *anything more than a mere deviation* of the railroad or telegraph line.

He said:

> *"There was no breaking of bulk or transfer of passengers in New Jersey."*

In the case at bar there was clearly, it is submitted, that which in the transmission of a telegraph message is equivalent to a breaking of bulk or a transfer of passengers in the transportation of freight or persons.

In the case at bar it was necessary that the message in question should be "relayed" at Bluefield,

in the State of West Virginia (Record, p. 13). To relay a message, as has been seen, involves two separate acts. It involves the receipt of the message over one telegraph wire by an operator, who writes it down as he receives it, and its transmission over another and different telegraph wire, to its designation, or the next relay point, by a telegraph operator—the one who received it, or some other. In any event it involves two separate acts: It involves the act of receipt, and the act of further transmission. That both of these acts were involved in the case of the message sued on, and that both acts were to be done at Bluefield, outside the State of Virginia, appears clearly from the Certificate of Facts (Record, p. 13). The message was sent to Bluefield (Certificate of Facts, Subdivision 3); the message was received at Bluefield (*Ibid.*); and the message was never received at Pocahontas, Va.—the next point (Certificate of Facts, Subdivision 4).

Had this situation been presented to the Court that decided the Lehigh Valley case, it is submitted that the transaction would clearly have been held to be interstate commerce. There was a transshipment. There was a breaking of bulk.

There is a second reason why, even under the doctrine of the Lehigh Valley case, it is impossible to sustain this statute of Virginia, in its application to the message in the case at bar.

The decision in the Lehigh Valley case was, first and last, *a tax decision*. It did not involve, and should never have been understood to involve any question of the regulation of commerce. It involved nothing more than the taxation of property, and nothing *but the taxation of property within the State*.

Said the Chief Justice:

"The tax under consideration here was determined in respect of receipts *for the proportion of the transportation within the State.*"

Said the Chief Justice again:

"It should be remembered that the question does not arise * * * as to taxation upon the property of the company situated elsewhere than in Pennsylvania,"—

(This is singularly clear.)

—"*nor as to the regulation by Pennsylvania of the operations of this or any other company elsewhere,*" etc.

It is not to be supposed for a moment that the transportation involved in the Lehigh Valley case would, by any fiction, have been regarded as domestic to Pennsylvania, had the question been presented in a form involving, not the power of the State of Pennsylvania *to tax property* within its own limits, but the power of the State of Pennsylvania *to regulate the acts of a carrier in the State of New Jersey*, or to provide what the carrier should do in that State, or how the carrier should do it.

State Decisions Following and Improperly Extending Lehigh Valley R. R. vs. Pennsylvania.

The three most conspicuous examples of the lengths to which the fiction adopted in the Lehigh Valley case has been carried are:

Campbell vs. Chicago, etc., Railway, 86 Iowa, 587.

Seawell vs. Kansas City, etc., Railway, 119 Mo., 222.

State *ex rel.* R. R. Commissioners vs. W. U. Tel. Co., 113 N. C., 213.

As all these cases may be considered overruled, in so far as they relate to this particular point, by Hanley vs. Kansas City Southern Ry. Co., 187 U. S., 617, and as the three cases first named would be decisive of the case at bar in a manner contrary to the contention of the plaintiff in error, they may be briefly examined.

Campbell vs. Chicago, etc., Railway involved the validity of an order of the Railroad Commission of Iowa fixing a rate for the transportation of goods from Beloit, in the State of Iowa, to Sioux City, in the same State, a part of the transportation, a little less than one-half, in all, of the total distance, being through the State of South Dakota. The railway line crossed the South Dakota boundary four times. It was held, on the authority of the Lehigh Valley case, that this transportation was not interstate commerce, and that the provision of the Iowa statute, under which the schedule of rates sought to be enforced was adopted (Section 1 of Chapter 28 of the Acts of the Twenty-second General Assembly), to the effect that the regulations of that chapter, fixing the maximum rates of freight, should be applicable whether the transportation "shall be wholly within this State or partly within this State and an adjoining State or States" was *not* unconstitutional.

Seawell vs. Kansas City, etc., Railway involved the right of a shipper to recover a penalty provided for under the Revised Statutes of Missouri, for receiving a greater compensation for a short haul than for a long haul. The transportation in question was from Carbon Center, in the State of Missouri, to Kansas City, in the State of Missouri, but four-fifths of it was in the State of Kansas. On the authority of the Lehigh Valley case the Supreme Court of Missouri held that this transportation was not interstate commerce, and that the penalty was recoverable.

State ex rel. R. R. Commissioners vs. W. U. Tel. Company is of the greatest interest in connection with the case at bar. It involved the power of the Railroad Commission of North Carolina to fix rates for the transmission of telegraph messages from points along the Norfolk and Southern Railroad, in the State of North Carolina, to other points in the same State, it appearing, however, that in the transmission of all such messages the "shortest and only route" used by the defendant traversed about two hundred and sixty-nine miles in Virginia, and required messages to be sent by way of Norfolk. *On the authority of the Lehigh Valley case the Supreme Court of North Carolina held that such messages were not interstate commerce, and were subject to regulation by the Railroad Commissioners of the State.*

The Court said:

> "A more serious question, however, is presented by the ruling of the Court upon the third conclusion of the Commission, which is as follows: 'That telegraphic messages transmitted by defendant over its said line from Elizabeth City or Edenton, or other points in North Carolina, to points in said State, do not constitute commerce between States, although traversing another State in the route, and are subject to the rate prescribed by the Commission.' It appears from the findings of fact that the shortest and only route over the wire of the defendant, by which messages can be transmitted to many points in this State, necessarily 'traverses,' in part, the State of Virginia and thence back into North Carolina; and it is insisted that such messages so transmitted are interstate commerce, and therefore not subject to the tariff regulation of the Commission.
>
> "It is not denied that the offices of the defendant along the line of the Norfolk and Southern Railroad Company, except those at

Edenton and Elizabeth City, receive commercial messages for transmission, in the manner described, to various points in North Carolina; and it is plain that such business does not relate to the intercourse of the citizens of this State with those of some other State. * * * *It must be manifest, therefore, that this business is without a single feature of interstate commerce, unless it can be found in the fact that, in the transmission of a message [illegible] traverse a part of the defendant's ou[illegible] the State of Virginia.* We have been [illegible]d to several cases in which it has been h[illegible], in respect to the continuous carriage of freight by a railroad company under such circumstances, that a State Commission had no power to prescribe rates, and also that a State had no right to levy a tax upon the gross receipts, even as to that part derived from the transportation within its territory. (State vs. Chicago Railroad Co., 40 Minn., 267; Sternberger vs. Railroad, 29 S. C., 510; North Carolina Cotton Exchange vs. Cincinnati, N. O. & T. P. Railroad, 2 Interstate Commerce Reports, 386.)

"Without attempting to discuss these cases, and to distinguish them in some particulars from ours, it is sufficient to say that, if they are not distinctly overruled, their principle is certainly in conflict with the reasoning of the opinion of the Supreme Court of the United States (Fuller, C. J.) in Lehigh Valley Railroad Co. vs. Pennsylvania, 145 U. S., 192.)"

Hanley vs. Kansas City Southern Railway.

In Hanley vs. Kansas City Southern Railway Company, 187 U. S., 617 (1902), the Lehigh Valley case was explained, the doctrine of that case confined within its proper limits, the foregoing decisions of the State Courts extending the doctrine of the Lehigh Valley case expressly disapproved, and

the true rule of law applicable to transportation or transmission of the character involved in the case at bar recognized and applied. It is the belief of counsel for plaintiff-in-error, as it was the belief of the two dissenting justices in the Supreme Court of Appeals of Virginia, that the Hanley case is conclusive of the present litigation and that no distinction between them is possible, except the distinction, which certainly does not assist the defendant-in-error, that in the case at bar the message was *relayed* in the foreign State, while in the Hanley case the transportation was continuous.

The Hanley case involved the right of the Railroad Commission of the State of Arkansas to fix and enforce rates covering the transportation of goods on a through bill of lading from Forth Smith, Ark., to Grannis, *Ark.* (not Grannis, *Kansas*, as would appear from a misprint in the official syllabus in 187 U. S.), over the lines of the Kansas City Southern Railway, the complainant below in that case, by way of Spiro in the Indian Territory, a total distance of one hundred and sixteen miles, of which fifty-two were in Arkansas and sixty-four in the Indian Territory; there having been no transshipment in the Territory, and no breaking of bulk. The case came to this Court on appeal from a decree of the Circuit Court of the Eastern District of Arkansas, overruling a demurrer to a complaint by the railway company against the Railroad Commissioners of the State, seeking to enjoin them from fixing and enforcing rates covering the transportation referred to. It was held that the transportation in question was interstate commerce, and that it was under the regulation of Congress and free from interference by the State; and that the bill for injunction stated a cause of action for equitable relief, and that the decree of the Circuit Court should be affirmed.

Mr. Justice HOLMES, writing the opinion of this Court, after premising that the power of Congress over commerce between Arkansas and the Indian Territory is not less than its power over commerce among the States, summed up the situation in a few incisive words:

> "*The transportation of these goods certainly went outside of Arkansas,* and we are of opinion that in its aspect of commerce it was not confined within the State. *Suppose that the Indian Territory were a State and should try to regulate such traffic, what would stop it? Certainly not the fiction that the commerce was confined to Arkansas.* If it could not interfere the only reason would be that this was commerce among the States. But if this commerce would have that character as against the State supposed to have been formed out of the Indian Territory, it would have it equally as against the State of Arkansas. If one could not regulate it the other could not."

Continuing he says:

> "No one contends that the regulation could be split up according to the jurisdiction of State or Territory over the track, or that both State and Territory may regulate the whole rate. There can be but one rate, fixed by one authority, whether that authority be Arkansas or Congress. Wabash, St. Louis & Pacific Railway Co. vs. Illinois, 118 U. S., 557; Covington & Cincinnati Bridge Co. vs. Kentucky, 154 U. S., 204; Hall vs. De Cuir, 95 U. S., 485. But it would be more logical to allow a division according to the jurisdiction over the track than to declare that the subject for regulation is indivisible, yet that the indivisibility does not depend upon the commerce being under the authority of Congress, but upon a fiction which attributes it wholly to Arkansas, although that fiction is quite beyond the power of Arkansas to enforce.
>
> "It is decided that navigation on the high

seas between ports of the same State is subject to regulation by Congress, Lord vs. Steamship Co., 102 U. S., 541, and is not subject to regulation by the State, Pacific Coast Steamship Co. vs. Railroad Commissioners, 9 Sawyer, 253, and although it is argued that these decisions are not conclusive, the reason given by Mr. Justice Field for his decision in the last cited case disposes equally of the case at bar. 'To bring the transportation within the control of the State, as part of its domestic commerce, the subject transported must be within the entire voyage under the exclusive jurisdiction of the State.' 9 Sawyer, 258. Decisions in point are State vs. Chicago, St. Paul, Minneapolis & Omaha Railway Co., 40 Minnesota, 267; Sternberger vs. Cape Fear & Yadkin Valley Railroad Co., 29 So. Car., 510. See also Milk Producers' Protective Association vs. Delaware, Lackawanna & Western Railroad Co., 7 Interstate Commerce Rep., 92, 160, 161.

"There are some later State decisions contrary to those last cited. Campbell vs. Chicago, Milwaukee & St. Paul Railway Co., 86 Iowa, 587; Seawell vs. Kansas City, Ft. Scott & Memphis Railroad Co., 119 Missouri, 222; Railroad Commissioners vs. Western Union Telegraph Co., 113 No. Car., 213. But these decisions were made simply out of deference to conclusions drawn from Lehigh Valley Railroad Co. vs. Pennsylvania, 145 U. S., 192, and we are of opinion that they carry their conclusions too far. That was the case of a tax and was distinguished expressly from an attempt by a State directly to regulate the transportation while outside its borders. 145 U. S., 204."

No Distinction Between the Transportation in the Hanley Case and the Transmission in the Case at Bar.

It is impossible to conceive of any valid distinc-

tion between the Hanley case and the present one except the distinction already adverted to, and on which certainly the defendant-in-error does not rely; the distinction, namely, that the transportation in the Hanley case was continuous, while in the case at bar there was the "relaying" of the message in the foreign State—the telegraphic equivalent of a breaking of bulk.

In both cases the subject under consideration was commerce.

In both cases the question was whether or not it was subject to regulation by a State.

In both cases the commerce had its origin and destination in the same State.

In both cases the subject of commerce necessarily passed, in transit, out of the physical and territorial jurisdiction and control of the State of its origin and destination, and into that of a foreign State.

In both cases it was the State of origin and destination which sought to regulate the commerce.

The only conceivable distinctions between the cases (apart from that already adverted to) are (1) that the Hanley case involved Arkansas and the Indian Territory, while the case at bar involves Virginia and West Virginia; and (2) that the Hanley case involved the carriage of goods, while the case at bar involves the transmission of a message.

But in deciding the Hanley case it was clearly present to the minds of the Court that the result there reached, whatever it might be, must be applicable to the transmission of messages as well as to the transportation of freight. **This is certain from the fact that the Court expressly disapproves the decision of the Supreme Court of North Carolina in Railroad Commissioners vs. W. U.**

Tel. Co. (supra), holding that the transmission of messages in such a case as the case at bar was within the doctrine of Lehigh Valley vs. Pennsylvania, and, as such, not interstate commerce.

Of the five justices of the Supreme Court of Virginia, who participated in the decision of this case, two dissented from the judgment of the Court. Judge CARDWELL, with whom Judge KEITH concurred, handed down a dissenting opinion which concluded as follows:

> "I am of opinion that upon this state of facts this Court is bound by the decision of the Supreme Court of the United States in Hanley vs. Kansas City, etc., Co., *supra*, to hold that the statute, in so far as it authorizes the imposition of the penalty in such a case, transcends the police power of the State and violates Sec. 8, Art. 1, of the Constitution of the United States" (Record, p. 19).

But perhaps the most significant proof of the entire absence of any ground for a satisfactory distinction between this case and that of Hanley, is the attitude of the majority of the Supreme Court of Virginia, as expressed in their opinion:

> "The case in judgment, in our opinion, involves the exercise of an important police power of the State, a power which ought not to be surrendered and which we are unwilling to surrender in the absence of a direct and authoritative declaration on the part of the Supreme Court of the United States that it is violative of the Federal Constitution (Record, p. 20)"

The plaintiff-in-error respectfully asks this Court for the direct and authoritative declaration which the Supreme Court of Appeals of Virginia demands.

II.

A STATE STATUTE REGULATING THE TRANSMISSION OF TELEGRAMS IS INVALID, IN ITS APPLICATION TO INTERSTATE MESSAGES, UNLESS IT IS TO BE SUPPORTED UNDER THE EXCEPTIONAL DOCTRINE OF W. U. TEL. CO. VS. JAMES; AND THE STATUTE IN QUESTION, IN ITS APPLICATION TO THE TRANSMISSION OF THIS MESSAGE, CANNOT BE SO SUPPORTED, BECAUSE THERE WAS NO DEFAULT WITHIN THE STATE OF VIRGINIA.

It will not be disputed that, *prima facie*, a State statute requiring, under a penalty, that telegrams shall be transmitted and delivered, and prescribing the order in which the transmission and delivery shall take place, is an attempt to regulate commerce. In so far as such a statute assumes to apply to an interstate message, it assumes to regulate interstate commerce; and it requires no elaborate reference to authorities to establish that such an attempt at regulation of interstate commerce, by a State, is *prima facie* invalid.

Hall vs. De Cuir, 95 U. S., 485.
W. U. Tel. Co. vs. Pendleton, 122 U. S., 347.

In Hall vs. De Cuir a statute of Louisiana forbade all carriers of passengers to refuse admission to their vehicles to any person of good character,

etc., especially forbidding any discrimination on account of color or race. Under that statute the plaintiff, a colored woman, journeying from New Orleans to Hermitage, both in the State of Louisiana, insisted on admission to a steamboat cabin reserved for white persons. The question was whether the statute of Louisiana could constitutionally apply to the transportation of the plaintiff between the points named, both in Louisiana; the fact being that the vessel on which she was a passenger was engaged in the transportation of passengers and freight along the Mississippi River between New Orleans, in the State of Louisiana, and Vicksburg, in the State of Mississippi, touching at the intermediate landings both within and without Louisiana, as occasion required. This Court held, reversing the Supreme Court of Louisiana, that the Louisiana act, in so far as it had been held by the Supreme Court of that State to apply to vessels engaged in interstate commerce, *even while those vessels were proceeding between two given points in the same State*, was unconstitutional, as an attempted interference, by the State, with the power of regulation which, as to such traffic, was vested exclusively in Congress:

> "This power of regulation may be exercised without legislation as well as with it. By refraining from action, Congress, in effect, adopts as its own regulations those which the common law, or the civil law where that prevails, has provided for the government of such business, and those which the States, in the regulation of their domestic concerns, have established affecting commerce, but not regulating it within the meaning of the Constitution. In fact, congressional legislation is only necessary to cure defects in existing laws, as they are discovered, and to adapt such laws to new developments of trade. As was said by Mr. Justice FIELD, speaking for the Court in Wel-

ton vs. The State of Missouri, 91 U. S., 282, 'inaction [by Congress] * * * is equivalent to a declaration that interstate commerce shall remain free and untrammelled.'"

The following language of the Court, which has been widely quoted, is also significant:

> "If each State was at liberty to regulate the conduct of carriers while within its jurisdiction, the confusion likely to follow could not but be productive of great inconvenience and unnecessary hardship. Each State could provide for its own passengers and regulate the transportation of its own freight, regardless of the interests of others. Nay, more, it could prescribe rules by which the carrier must be governed within the State in respect to passengers and property brought from without. On one side of the river or its tributaries he might be required to observe one set of rules, and on the other another. Commerce cannot flourish in the midst of such embarrassments. No carrier of passengers can conduct his business with satisfaction to himself or comfort to those employing him, if on one side of a State line his passengers, both white and colored, must be permitted to occupy the same cabin, and on the other be kept separate."

W. U. Tel. Co. vs. Pendleton.

In the Pendleton case (122 U. S., 347) it appeared that a statute of Indiana (Revised Statutes of Ind., 1881, Sections 4176, 4178) required telegraph companies to deliver dispatches by messenger to the persons to whom the same were addressed, or to their agents, provided they resided within one mile of the telegraphic station, or within the city or town in which such station was, under a penalty of one hundred dollars. The plaintiff below in that case sued to recover the above penalty for the failure of the telegraph company, the de-

fendant below, to deliver at Ottumwa, in Iowa, a message received by it in Indiana for transmission to that place. The Supreme Court of Indiana construed the statute above referred to as applying to the delivery of the message then in question at Ottumwa, and affirmed a judgment in favor of the plaintiff for the amount of the penalty. On writ of error to this Court, the judgment was reversed. It was held that the statutes in question were in conflict with the commerce clause of the United States Constitution "in so far as they attempt to regulate the delivery of such dispatches at places situated in other States;" that **"the authority of Congress over the subject of commerce by telegraph with foreign countries or among the States being supreme, no State can impose an impediment to its freedom, by attempting to regulate the delivery in other States of messages received within its own borders;"** and that the police power of the State did not extend "to the regulation of the delivery at points without the State" of messages received within, but only to the making of "all necessary provisions in respect of the buildings, poles and wires of telegraph companies **within its jurisdiction,** which the comfort and convenience of the community may require."

Mr. Justice FIELD wrote the opinion of the Court:

> "The object of vesting the power to regulate commerce in Congress was to secure, with reference to its subjects, uniform regulations, where such uniformity is practicable, against conflicting State legislation. Such conflicting legislation would inevitably follow with reference to telegraphic communications between citizens of different States, if each State

was vested with power to control them beyond its own limits. The manner and order of the delivery of telegrams, as well as of their transmission, would vary according to the judgment of each State. Indiana, as seen by its law given above, has provided that communications for or from officers of justice shall take precedence, and that arrangements may be made with publishers of newspapers for the transmission of intelligence of general and public interest out of its order; but that all other messages shall be transmitted in the order in which they are received; and punishes as an offense a disregard of this rule. Her attempt, by penal statutes, to enforce delivery of such messages in other States, in conformity with this rule, could hardly fail to lead to collision with their statutes. Other States might well direct that telegrams on many other subjects should have precedence in delivery within their limits over some of these, such as telegrams for the attendance of physicians and surgeons in case of sudden sickness or accident, telegrams calling for aid in cases of fire or other calamity, and telegrams respecting the sickness or death of relatives.

"Indiana also requires telegrams to be delivered by messengers to the persons to whom they are addressed, if they reside within one mile of the telegraph station, or within the city and town in which such station is; and the requirement applies, according to the decision of its Supreme Court in this case, when the delivery is to be made in another State. Other States might conclude that the delivery by messenger to a person living in a town or city being many miles in extent was an unwise burden, and require the duty within less limits; but if the law of one State can prescribe the order and manner of delivery in another State, the receiver of the message would often find himself incurring a penalty because of conflicting laws, both of which he could not obey. Conflict and confusion would only follow the

> attempted exercise of such a power. We are clear that it does not exist in any State."

It is to be observed that the Virginia statute under consideration in the case at bar is extremely similar to the Indiana statute considered in W. U. Tel. Co. vs. Pendleton. Like the Indiana statute it contains a provision that:

> "Nothing herein shall prevent any such company from giving preference to dispatches on official business, from or to officers of the United States, or the State of Virginia, or from making arrangements with proprietors or publishers of newspapers, for the transmission to them, for publication, of intelligence of general and public interest, out of its regular order."

Every word said by Mr. Justice Field applies as well to the Virginia statute as to that of Indiana. There is nothing in the law of West Virginia which authorizes a telegraph company to prefer a dispatch, sent on the official business of the State of Virginia, to a prior dispatch received in any telegraph office in West Virginia; nor is there anything in the law of West Virginia which authorizes the preference of messages addressed to newspapers. What was the duty of this plaintiff in error, on the receipt of the message in suit at Bluefield in the State of West Virginia, with reference to its further transmission? If the Virginia statute applied, as the Supreme Court of Virginia has held that it did apply, to the conduct of the agents of the telegraph company at the Bluefield, West Virginia, office, what was the duty of those agents in respect of this message? Could it have been postponed for the sake of giving a preference to a later message affecting the official business of the State of Virginia? Was it not within the police power of the State of West Virginia to prescribe the order in which messages received at Bluefield should be sent

from Bluefield to Pocahontas, if it was within the power of the State of Virginia to prescribe the order in which messages should be sent from Danville to Bluefield? Which law was it the duty of the Bluefield operators to obey?

W. U. Tel. Co. vs. James.

In W. U. Tel. Co. vs. James, 162 U. S., 650, the exceptional rule of law under which the majority of the Supreme Court of Appeals of Virginia has undertaken to support the judgment of the Corporation Court of Danville in the present case was first enunciated and defined.

That case was the converse of the Pendleton case.

In the Pendleton case the message orginated in Indiana, and was sent to Iowa, and it was for a default in the State of Iowa that the plaintiff sought to recover the Indiana penalty in an Indiana Court. In the James case, on the contrary, the message orginated in Alabama, and was destined to a place in Georgia; it was properly transmitted to the point of destination, within the State of Georgia, and there was a negligent failure to deliver there; and the plaintiff sued in a Georgia Court for the penalty provided for by the laws of Georgia, for the default in that State.

This Court sustained the Georgia statute, in its application to the message then sued on, on the ground that the default which was then the subject of complaint was a default which occurred within the jurisdiction of the State of Georgia, and not in any foreign State. It said:

> "We see no reason to fear any weakening of the protection of the constitutional provision as to commerce among the several States by holding that in regard to such a message as the one in question, although it comes from a

> place without the State, *it is yet under the jurisdiction of the State where it is to be delivered (after its arrival therein at the place of delivery)*, at least so far as legislation of the State tends to enforce the performance of duty owed by the company under the general law."

And again:

> "Nor is the statute open to the same objections that were regarded as fatal in the Pendleton case, 122 U. S., 347. **No attempt is here made to enforce the provisions of the State statute beyond the limits of the State, and no other State could by legislative enactment affect in any degree the duty of the company in relation to the delivery of messages within the limits of the State of Georgia.** No confusion therefore could be expected in carrying out within the limits of that State the provisions of the statute."

It is to be observed that Mr. Justice White and Mr. Justice Shiras dissented from the opinion of the majority in the James case, seeing no sound distinction between that case and the Pendleton case.

In the Case at Bar there was no Default in Virginia.

But whether or not the difference between the facts of the James case and the facts of the Pendleton case justified the difference in the result reached—whether or not the distinction made between those cases by the majority of the Court in the James case was sound on principle, it is perfectly clear, at least, what that distinction was. Reading W. U. Tel. Co. vs. Pendleton and W. U. Tel. Co. vs. James together, and giving each case

its full value, we arrive at the following rule of law and exception:

> RULE. A State statute regulating the transmission of telegrams is invalid in so far as it applies, or assume to apply, to the transmission or delivery of messages to or from other States;
>
> EXCEPTION. But such a statute may be valid as applied to a default in the delivery of a message after its arrival at its place of delivery within the State where the statute exists, even though such message originated in a foreign State.

The Supreme Court of Appeals of Virginia has sought to sustain this judgment under the doctrine of W. U. Tel. Co. vs. James (Record, p. 20); and it is believed that there is no contention on the part of defendant-in-error that it is to be supported on any other principle.

But the essential feature, which was present in the James case, and which in the minds of the majority of the Court distinguished it from that of Pendleton, was that the default relied on by the plaintiff occurred *within the limits of the State of Georgia:*

> "Under the jurisdiction of the State where it" (the message) "is to be delivered (after its arrival therein at the place of delivery)—"
>
> Opinion of the Court, page 661.

And again:

> "No attempt is here made to enforce the provisions of the State statute beyond the limits of the State."
>
> *Ibid.*, page 662.

If the message in the James case, which originated in Alabama, had never been sent out of Alabama or into the jurisdiction of the State of Georgia, can it be doubted for a moment that this

Court would have refused to allow the Georgia statute to apply? To apply the statute, in that case, would have been to permit the State of Georgia to regulate the acts of a telegraph company's agents in the State of Alabama, which is absurd.

In the case at bar there was no default within the State of Virginia. This appears clearly from the Certificate of Facts (Record, p. 13). The message was sent as promptly as practicable, faithfully, impartially, and in the order of its receipt by the company, from Danville, Va., to Richmond, Va., and thence to Bluefield, in the State of West Virginia. It was received at Bluefield in the State of West Virginia; and thereafter it does not appear what became of it. Certainly there is no suggestion, nor is it possible to draw any inference, that it ever came back again, at any time, within the State of Virginia or under the jurisdiction thereof. *It affirmatively appears that it was never received at Pocahontas.* Whatever was done with the message—for whatever reason it failed in transmission, as to which the record is silent—**the fault, if any, was at Bluefield, and was not within the State of Virginia.**

There is nothing in the record from which the Corporation Court, the Supreme Court of Virginia, or this Court could infer that at any time or at any place within the geographical boundaries of Virginia and the territorial jurisdiction of that State, this plaintiff in error or any of its agents or servants was guilty of a violation of the statute now under consideration with respect to this message or failed in any duty imposed thereby. The plaintiff in error, the defendant below, did fail in the duty which the statute sought to impose; but the failure was a failure on the part of the

defendant to forward the message from Bluefield, and that was not within the jurisdiction of the State of Virginia, and the James case does not authorize the plaintiff to recover a penalty for the violation, at Bluefield, of a Virginia penal law.

In favor of this plaintiff, an informer, who has sustained no actual damage and whose recovery is, substantially, a fine, this Court should not, it is respectfully submitted, be alert to sustain, by the fiction adopted for another purpose in the Lehigh Valley case, this judgment of the Supreme Court of Virginia.

III.

THE JUDGMENT OF THE SUPREME COURT OF APPEALS OF VIRGINIA SHOULD BE REVERSED.

Respectfully,

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